

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**R.H., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Addison, NY, Employer**

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**Docket No. 10-298  
Issued: August 6, 2010**

*Appearances:*

*Thomas S. Harkins, Esq., for the appellant*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On November 13, 2009 appellant filed a timely appeal from a May 28, 2009 decision of the Office of Workers' Compensation Programs that denied his request for reconsideration as it was untimely filed and did not establish clear evidence of error. As there is no merit decision within one year of the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim.<sup>1</sup> Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the May 28, 2009 decision.

**ISSUE**

The issue is whether the Office properly denied appellant's request for reconsideration on the grounds that it was not timely filed and did not demonstrate clear evidence of error.

On appeal his attorney asserts that the Office should have conducted a merit review and considered medical reports of Dr. Michael Cilip, a Board-certified internist, dated July 27 and August 15, 2005.

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<sup>1</sup> 20 C.F.R. § 501.2(c).

## **FACTUAL HISTORY**

This case has previously been before the Board. By decision dated August 20, 2007, the Board found that the Office properly denied appellant's request for reconsideration on November 29, 2006.<sup>2</sup> On November 29, 2007 the Board denied his petition for reconsideration.<sup>3</sup>

On March 12, 2009 appellant, through counsel, requested reconsideration contending clear evidence of error by the Office as it misplaced Dr. Cilip's July 27 and August 15, 2006 reports, submitted with the August 1, 2006 reconsideration request. On July 27, 2005 Dr. Cilip noted his progressing complaints of back and hip problems since 1998 and had stopped work on October 1, 2004 due to back and foot pain. He provided physical examination findings, noting a positive straight-leg raising test, worse on the left and subjective numbness over the lateral aspect of the left foot. Dr. Cilip diagnosed chronic back pain, osteoarthritis of the knees and hips with chronic pain and chronic plantar fasciitis with chronic foot pain and advised that appellant was totally disabled from his previous work walking long distances and carrying or pushing a heavy mailbag. In an August 15, 2005 report, Dr. Cilip opined that appellant's back, hip and foot problems were a direct result of his work duties of walking over 11 miles a day carrying a load with the employing establishment.

By decision dated May 28, 2009, the Office denied appellant's reconsideration request on the grounds that it was untimely filed and he failed to establish clear evidence of error.

## **LEGAL PRECEDENT**

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.<sup>4</sup> It will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.<sup>5</sup> When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that its final merit decision was in error.<sup>6</sup> Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in section 10.607 of the Office regulations,<sup>7</sup> if the claimant's application for review shows "clear

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<sup>2</sup> Docket No. 07-937 (issued August 20, 2007).

<sup>3</sup> On January 21, 2005 appellant, then a 52-year-old letter carrier, filed an occupational disease claim alleging that his work duties caused hip pains. By decision dated August 24, 2005, the Office denied the claim. On August 1, 2006 through his attorney, he requested reconsideration. In a nonmerit November 29, 2006 decision, the Office denied his request. On February 17, 2007 he filed an appeal with the Board and submitted reports dated July 27 and August 15, 2005 from Dr. Cilip. In its August 20, 2007 decision, the Board noted that it could not consider this evidence as its review of the case was limited to the evidence of record at the time the Office issued its final decision.

<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> 20 C.F.R. § 10.607(b); *see Gladys Mercado*, 52 ECAB 255 (2001).

<sup>6</sup> *Cresenciano Martinez*, 51 ECAB 322 (2000).

<sup>7</sup> 20 C.F.R. § 10.607.

evidence of error” on the part of the Office. In this regard, it will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>8</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error. Evidence which does not raise a substantial question concerning the correctness of the Office’s decision is insufficient to establish clear evidence of error. It is not enough to merely show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office. To show clear evidence of error, the evidence submitted must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.<sup>9</sup>

Office procedures note that the term “clear evidence of error” is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.<sup>10</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office.<sup>11</sup>

### ANALYSIS

The Board finds that as, more than one year had elapsed from the date of issuance of the most recent merit decision of August 24, 2005 appellant’s request for reconsideration on March 12, 2009 was untimely filed.<sup>12</sup> Consequently, he must demonstrate clear evidence of error by the Office in denying his claim for disability compensation.<sup>13</sup>

The Board also finds that appellant failed to establish clear evidence that the August 24, 2005 decision of the Office was clear in error. The underlying merit issue was whether appellant established that he had a medical condition causally related to his federal employment. In the only merit decision in this case dated August 24, 2005 the Office denied appellant’s claim on the grounds that he submitted insufficient medical evidence to support that he sustained an injury or condition causally related to his federal employment. With appellant’s untimely reconsideration request, he submitted new medical evidence. In July 27 and August 15, 2006 reports, Dr. Cilip,

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<sup>8</sup> *Alberta Dukes*, 56 ECAB 247 (2005).

<sup>9</sup> *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>10</sup> *James R. Mirra*, 56 ECAB 738 (2005).

<sup>11</sup> *Nancy Marcano*, 50 ECAB 110 (1998).

<sup>12</sup> *Supra* note 5.

<sup>13</sup> 20 C.F.R. § 10.607(b).

an attending internist, noted appellant's complaints of back and hip problems since 1998, provided physical findings on examination and diagnosed chronic back pain, osteoarthritis of the knees and hips with chronic pain and chronic plantar fasciitis with chronic foot pain. He found that appellant was totally disabled from his previous work and opined that his back, hip and foot problems were a direct result of his work duties of walking over 11 miles a day and carrying or pushing a heavy mailbag.

Dr. Cilip generally described appellant's employment duties as a letter carrier, offered diagnoses and support for causal relationship. To the extent he supported causal relationship, clear evidence of error is intended to represent a difficult standard. Even evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development is not clear evidence of error and would not require reopening the case.<sup>14</sup> The Board finds that Dr. Cilip's reports are not the type of positive, precise and explicit evidence, which manifests on its face that the Office committed an error.<sup>15</sup>

The clear evidence of error is intended to represent a difficult standard and the medical evidence provided here is not the type of positive, precise and explicit evidence, which manifested on its face that the Office committed an error.<sup>16</sup> As the evidence and argument submitted are of insufficient probative value to shift the weight in favor of appellant and raise a substantial question as to the correctness of the August 24, 2005 Office decision, appellant has not established that the Office committed error by its August 24, 2005 decision.<sup>17</sup> The Board, therefore, finds that in accordance with its internal guidelines and with Board precedent, the Office properly performed a limited review of the evidence and argument submitted by appellant with his March 12, 2009 reconsideration request to ascertain whether it demonstrated clear evidence of error in the August 24, 2005 decision and correctly determined that it did not and thus denied appellant's untimely request for a merit reconsideration on that basis.<sup>18</sup> Appellant argues that the medical reports had been submitted with his original reconsideration request. A careful review of the report could not reveal such submission. It is incumbent upon appellant consistent with his burden of proof, to ensure the record is complete.

### **CONCLUSION**

The Board finds that, as appellant's March 12, 2009 reconsideration request was not timely filed and he failed to establish clear evidence of error, the Office properly denied a merit review of his claim by its May 28, 2009 decision.

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<sup>14</sup> *James R. Mirra, supra* note 10.

<sup>15</sup> *D.O.*, 60 ECAB \_\_\_\_ (Docket No. 08-1057, issued June 23, 2009).

<sup>16</sup> *Id.*

<sup>17</sup> *Nancy Marciano, supra* note 11.

<sup>18</sup> 20 C.F.R. § 10.607(b); *see D.G.*, 59 ECAB \_\_\_\_ (Docket No. 08-137, issued April 14, 2008).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 28, 2009 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: August 6, 2010  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board